Supreme Court, U. S.
FILED
DEC 7 1977
MICHAEL RODAK, JR., CLERK

BRIEF ON BEHALF OF CITY OF NEWPORT NEWS IN OPPOSITION TO WRIT OF CERTIORARI

In The

Supreme Court of the United States

October Term, 1977

No. 77-540

WILLIAM A. MOORE, ET AL.,
Petitioners,

v.

HAMPTON ROADS SANITATION DISTRICT COMMISSION
AND
CITY OF NEWPORT NEWS,
Respondents.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

F. O. BLECHMAN
HERBERT V. KELLY
E. D. DAVID
Of Counsel

JONES, BLECHMAN, WOLTZ & KELLY, P.C.
2600 Washington Avenue—Suite 700
Newport News, Virginia 23607
Counsel for Respondent

TABLE OF CONTENTS

Page

Jurisdiction 1

Questions Presented 2

Statement of the Case 2

Summary of Argument for Denial of Writ of Certiorari 9

Argument I:
A writ should not be granted because the Fourth Circuit was right in its application of the law when it held that the negligent operation of a sewage system by a municipality of a state which impacts adversely on oyster beds leased by the state to the Petitioners should be governed by state law, not by federal maritime law 10

Argument II:
No writ should be granted because the unanimous federal and Virginia authority is that governmental activities negligently carried on in the performance of a public function, unrelated to a deliberate taking or necessary consequence or result of the public undertaking and are not compensable under the Fifth Amendment of the Constitution 16

Argument III:
A writ should not be granted because (1) there are no special and important reasons for granting a writ; (2) the holding of the Fourth Circuit is a limited one; and (3) the Petitioners have failed to present the case with accuracy, brevity and clearness as required by this Court's Rule 23(4) 17

Conclusion 19

TABLE OF CITATIONS

Cases

	Page
Askew v. American Waterways Operators, 411 U.S. 325 (1973)	14
Columbia Basin Orchard v. United States, 132 F. Supp. 707 (Ct. Cl. 1955)	17
Complete Auto Transit v. Brady, ... U.S. ....., 51 L. Ed. 2d 325 (1977)	14
Douglas v. Seacoast Products, ... U.S. ....., 52 L. Ed. 2d 304 (1977)	14
Eriksen v. Anderson, 195 Va. 655, 79 S.E.2d 597 (1954)	17
Ex Parte State of New York, 256 U.S. 490 (1921)	9, 15
Executive Jet Aviation v. Cleveland, 409 U.S. 249 (1972)	8, 9, 12, 13, 14, 15, 18
Healy v. Ratta, 292 U.S. 263 (1934)	14
McCready v. Virginia, 94 U.S. (IV Otto) 391 (1876)	11
Oregon v. Corvallis Sand and Gravel Co., ... U.S. ....., 50 L. Ed. 2d 550 (1977)	14
Pollard's Lessee v. Hagen, 44 U.S. (3 How.) 212 (1845)	11
Puyallup Tribe v. Washington Game Dept., ... U.S. ....., 53 L. Ed. 2d 667 (1977)	9, 14, 18
St. Francis Drainage Dist. v. Austin, 296 S.W.2d 668 (Ark. 1956)	16
Sanquinetti v. United States, 264, U.S. 146 (1924)	17
Smith v. Maryland, 59 U.S. (18 How.) 71	9, 11
Union Oil Co. v. Oppen, 501 F 2d 558 (9th Cir. 1974)	12
V.T.C. Lines v. Harlan, 313 S.W.2d 573 (Ky. 1957)	16
Victory Carriers, Inc. v. Law, 404 U.S. 202 (1971)	14
Weber v. Harbor Commissioners, 85 U.S. (18 Wall.) 57 (1873)	11

Treatise

2 A.L.R. 2d 677 "Damage to Private Property Caused by the Negligence of Governmental Agents as 'taking,' 'damage,' or 'use' for Public Purposes in a Constitutional Sense." 16

In The

Supreme Court of the United States

October Term, 1977

No. 77-540

WILLIAM A. MOORE, ET AL.,
Petitioners,

v.

HAMPTON ROADS SANITATION DISTRICT COMMISSION
AND
CITY OF NEWPORT NEWS,
Respondents.

CITY OF NEWPORT NEWS BRIEF IN OPPOSITION TO THE GRANTING OF WRIT OF CERTIORARI

JURISDICTION

The jurisdictional statement of the petitioner is incomplete and inaccurate.[1] At the conclusion of the Plaintiff's evidence on June 3, 1974 before the jury the District Court granted the Defendant, Hampton Roads Sanitation District Commission's (sometimes hereafter referred to as HRSDC) motion for a directed verdict pursuant to Rule 50(a) of the Federal Rules of Civil Procedure. Following the jury's responses to the special interrogatories, the District

[1] The Petitioners' writ says it seeks review of the District Court's opinion. That is obviously incorrect.

Court entered a judgment *non obstante veridicto* in favor of the Defendant, City of Newport News, on March 10, 1975. From this opinion the petitioners appealed to the Fourth Circuit Court of Appeals. The three-judge panel of the Fourth Circuit affirmed to the District Court as to HRSDC, but reversed as to the City of Newport News in an opinion dated October 7, 1976. The City of Newport News asked the Fourth Circuit for a hearing *en banc,* which motion was granted for consideration of the admiralty jurisdiction issue on November 24, 1976. The opinion of the full Fourth Circuit reversing its panel and affirming the District Court's opinion as to the City is dated July 13, 1977.

QUESTIONS PRESENTED[2]

Should The Law Of Admiralty Be Called Into Play Under The Principles Of Executive Jet To Govern The Rights And Duties Of The Parties When A Municipality Of A State Is Negligent In The Operation Of A Sewage Collection System, And Overflows Therefrom Occurring On Dry Land Eventually Impact On The Use Of Oyster Beds Leased By The Petitioners From The State Or Should That Situation Be Controlled By The Laws and Jurisdiction Of The State.

STATEMENT OF THE CASE

Petitioners are leasees of oyster beds in the Warwick River. If all goes well, oysters will grow on those beds to be harvested by the Petitioner, his employee or a subtenant.

[2] Respondent believes the questions presented by the petitioner misstate the issues. The issue is whether the interference to fishing operations caused by a sewage overflow to oyster beds leased from a State bears a significant "relationship between the tort and traditional maritime activities, involving navigation or commerce on navigable waters" so as to invoke the principles of admiralty. Respondent must concede that commercial fishing operations on navigable waters generally bear a significant relationship to traditional maritime activity. That question, however, does not advance this cause any closer to the key issue.

There are two types of harvesting: direct or indirect. Direct harvesting means that the waterman is free to pick up the oyster from the bed and sell it directly to market. Indirect harvesting requires the waterman to transplant the oyster to another bed for fifteen days before it can be sold to market.

Sometimes because of the condition of the water, a shellfish area is closed by the Virginia State Department of Health to the direct marketing of oysters, thus, necessitating indirect harvesting (called relaying). For over thirty years parts of the Warwick River have from time to time been closed. The City of Newport News operates and maintains pumping stations, which collect and pump sewage from individual households and businesses into the main feeder lines operated by the Hampton Roads Sanitation District Commission (hereafter "HRSDC"). Petitioners brought suit against the City of Newport News and HRSDC alleging that their joint and concurring negligence had polluted the River, thus, causing the State Department of Health to close the River to direct marketing. At trial, the petitioners abandoned all allegations of negligence on the part of HRSDC, laying the full blame at the feet of the City.

The evidence disclosed that the first closing of the Warwick River by the State Department of Health occurred on December 16, 1942. (Trial Transcript 139). At that time the entire Warwick River was closed. The river remained that way until June 21, 1946, when the condemnation was lifted to a point approximately 500 yards south of Lucas Creek (Potash Creek). (Trial Transcript 140-41). That part of the River, not opened in 1946 and originally closed in 1942, has remained closed until this very day. Essentially then the upper Warwick River was closed in 1942.

Again on February 26, 1962, the entire Warwick River was closed. (Trial Transcript 414). For a little over a year

this remained the condition until on March 5, 1963, the river was again reopened to a point approximately 2100 yards south of Lucas Creek. (Trial Transcript 142). Thus, the 1962 closing about which the petitioners complained took an additional 1600 yards of the Warwick River when compared to the 1946 opening.

On June 20, 1965, the River was again closed with approximately the same boundaries as the 1962 closing (Trial Transcript 143). On July 12, 1965, that closing was lifted. On December 9, 1965, that portion of the River which had been closed on February 26, 1962, was reopened (this was approximately 1600 yards.) (Trial Transcript 143). Approximately four months later, on April 1, 1966, the 1600 yards was again closed. (Trial Transcript 143).

In 1967, with the opening of the James River Sewage Treatment Plant by HRSDC, a closing was ordered around the outfall pipe. (Trial Transcript 143). This closed area has been referred to as the buffer zone. Later, on February 28, 1968, the buffer zone was reduced in size. (Trial Transcript 143-44). The last closing of the Warwick River occurred on March 29, 1972, when the area between these two previously closed zones was also closed. (Trial Transcript 144).

The Petitioners' theory of recovery against the City of Newport News for the closings is ultimately grounded on their assertion that the City was negligent in the operation of three of its pumping stations located some five miles from navigable waters when it allowed these pumping stations to overflow.[3] When a pumping station overflowed, raw, untreated sewage spilled into a street and a ravine, which

[3] Petitioners say in their statement of facts (App. 8) that they demonstrated that part of the source of the coliforms came from lateral sewerage conduits. Not a scintilla of evidence is in the record in this regard.

eventually ran off into a stream and made its way five miles downstream into the Warwick River[4] These overflows, according to Petitioners, were the primary cause of the high coliform counts which contributed to the decision of the State Department of Health to close the middle Warwick River in 1972 and the reason why the upper River has remained closed since 1966. (Petition 8).

On review of the record the Court will find no evidence of any negligence occurring before 1968. In point of fact, the Petitioners seem to admit as much when in response to pre-trial interrogatories they acknowledged there was no negligence on the part of the City prior to 1967.

Q. 26. State exactly when and how this defendant's sewage pipes and facilities caused damage to your property.

A. The sewage pipes in question have leaked continually since 1967.

The reasons for only four of all those closings were offered:

1. As to the 1963 closing the Director of the Bureau of Shellfish Sanitation for the State of Virginia offered the following reason for his action: "Well, as I recall it was due to unsatisfactory bacteriological conditions in the river." (Trial Transcript 135). There is no evidence in the record to explain what might have caused this unsatisfactory bacteriological condition. Certainly the

[4] The Petitioners' expert explained: "Most of the Stoneybrook stations we talked about are close proximally to receiving water, and the Stoneybrook number 2—can I label this, as a guess, perhaps 50 feet from the water. Stoneybrook 1, my understanding is the overflows occur out of a manhole in the street, from which it flows to a storm sewer, and thence to the receiving waters, being Stoneybrook. (Trial Transcript 91).

cause was not the City's pumping stations as they were not in existence at that time;

2. As to the 1966 closing, a letter introduced into evidence (HRSDC Exhibit 1, Trial Transcript 145) relates that the 1966 closing was due to the increased salinity in the water and the discharge of partially treated sewage into the water;[5]
3. As to the 1967 closing, the Director explained it was for a "buffer zone" around the plant operated by HRSDC;[6]
4. As to the 1972 closing, the Director explained:

> Q. What was the 1972 closing in reference to?
>
> A. In 1972 we closed the river because the water quality of the coliform content of the open section did not meet the standard of 70 per hundred millimeters. It was located between two condemned areas, and consequently after consultation with the the U. S. Food and Drug Administration decided that it should be closed. (Trial Transcript 135).

Thus, the Petitioners' case against the City boiled down to demonstrating that the high coliform counts leading to the 1972 closing resulted from the City's negligence. Evidence was adduced that three pumping stations frequently backed up and overflowed. These overflows were manifested by the bubbling of sewage up through a manhole in the middle of a city street, the sewage making its way to the non-navigable feeder streams of the Warwick River, meandering down these streams to the main part of the River.

---

[5] This closing cannot be attributed to the City because the overflows would be *untreated,* not partially treated, sewage.

[6] The "buffer zone" closing has no application in the Petitioners' case against the City.

After hearing the evidence, the jury was asked to respond to three "inquiries." As to each, the jury answered to the effect that:

1. The water quality of the Warwick River, which required its closure, was proximately caused by the maintenance and operation of the sewer system of the City of Newport News;
2. The city was guilty of negligence in the operation and maintenance of its sewer system as the same affected the Warwick River; and,
3. That such negligence was a proximate cause of conditions requiring the closure of the Warwick River. (Trial Transcript 577-78) [7].

The City then moved for a judgment *non obstante veredicto* on many grounds, principal of which were that (1) the evidence was insufficient to sustain the jury's findings; (2) the statute of limitations barred the plaintiff's claims; (3) the City was not given proper statutory notice; (4) the City was immune from tort liability; and (5) the evidence failed to disclose a compensable taking. Without reaching the first two contentions, the Court sustained the motion for a judgment *non obstante veredicto* on the grounds:

---

[7] The Fourth Circuit's panel noted that the jury found that the "high coliform count in the Warwick River which was the reason for the 1966 and 1972 closures" was a result of the City operation of the sewer system. (App. 35). Petitioner says in its Petition that the River was closed on "March 1, 1966 when the northern Warwick was condemned because of high coliform counts." (Petition 6).

It is clear from the facts that (1) the jury was not asked about a 1966 closing; (2) the 1966 closing was no more than a four months opening of a part of the River that had been closed for four years; and (3) had nothing to do with the City. (See HRSDC Exhibits 1, A-L, Trial Transcript 145). The evidence offered for the closings would only link the last closing (1972) to the City. Accordingly, the panel's statement and the Petitioners' assertion that the 1966 closing had anything to do with the City is plainly wrong.

1. That the Petitioners were barred from recovery because the City was immune from tort liability in carrying on the governmental function of collecting sewage;

2. That the Petitioners had failed to comply with Virginia's statute requiring notice when an alleged tort is committed by the City; and,

3. That there had been no taking.

Petitioners then appealed.[8]

The Fourth Circuit's panel avoided the impact of the District Court ruling by determining that the Plaintiff's claim was one cognizable under the maritime and admiralty jurisdiction of the Court. The majority reasoned that in a maritime claim, immunity from tort liability is not an available defense either by reason of the doctrine of sovereign immunity or by the application of a State's notice requirement.

On rehearing the full Circuit held that under the principles of *Executive Jet Aviation* v. *Cleveland,* 409 U.S. 249 (1972), there was no maritime jurisdiction on these facts.

> In light of these authorities, we think it is clear that the cultivation of oysters by the plaintiffs under leases from the State of Virginia is a purely local activity subject to the laws and jurisdiction of the state, and that the City's negligent intrusion upon the plaintiffs' oyster beds was not a maritime tort. Our holding is, of course, a narrow one for we recognize that many activities incident to the harvesting of oysters may properly be the subject of admiralty. (App. 63-65).

[8] The City contends that the intervening Plaintiffs are not before this Court since they did not appeal to the Fourth Circuit. See Plaintiffs' notice of appeal.

SUMMARY OF ARGUMENT FOR DENIAL OF WRIT OF CERTIORARI

Petitioners admit that the state owns the oyster beds and has the right to control when and how the beds are harvested. When a tort is committed by a municipality on dry land and the results of that tort impact on the use of the beds by the plaintiff, state law is peculiarly applicable to determine the controversy. All of the rights, duties, liabilities, and obligations of the parties are fixed by state law. The rules and concepts of admiralty have little or no application to the issues. Under this Court's ruling in *Executive Jet Aviation* v. *Cleveland,* 409 U.S. 249 (1972) when such a circumstance exists, it is clear that the wrong does not bear the required significant relationship to a traditional maritime activity.

Control over the harvesting of oysters by the State has been repeatedly recognized by the Court as early as *Smith* v. *Maryland,* 59 U.S. (18 How.) 71 (1855) and as late as *Puyallup Tribe* v. *Washington Game Dept.,*—U.S.—, 53 L. Ed. 2d 667 (1977). The harvesting of oysters raised by this case is not the type of maritime activity that this Court felt would give rise to maritime jurisdiction. *Executive Jet, op. cit.,* at 256.

Furthermore, there is not a maritime situs. The overflow of a pumping station on dry land, which ultimately impacts on navigable waters, does not render the appropriate maritime situs.

Even if there is admiralty jurisdiction the universal rule of state immunity to suit without its consent extends to cases of maritime and admiralty jurisdiction. *Ex Parte State of New York,* 256 W.S. 490 (1921).

The case does not involve a taking in contradistinction to the Fifth Amendment. The unanimous federal and state view is that tortious acts, if not a necessary consequence or result of a public undertaking, are not compensable under

the Fifth Amendment. The facts make it clear that what is involved is a tort, not a taking.

The decision in this case was limited by the Fourth Circuit to its facts. There are no special and important reasons to grant a writ. The imprecise nature of the findings and facts in this case make it a particularly unlikely candidate for a vehicle to expound policy and principles, which is the role of the decisions of this Court.

ARGUMENT I

A Writ Should Not Be Granted Because The Fourth Circuit Was Right In Its Application Of The Law When It Held That The Negligent Operation Of A Sewage System By A Municipality Of A State Which Impacts Adversely On Oyster Beds Leased By The State To The Petitioners Should Be Governed By State Law, Not By Federal Maritime Law.

Petitioners attempt to give a restriction on the direct marketing of oysters in a small inland waterway in Virginia, a global magnitude by their rhetoric and inaccurate statement of the facts.[9] The Fourth Circuit, however, correctly perceived the local nature and character of this particular case. The Fourth Circuit recognized that the ownership of the beds, *Pollard's Lessee* v. *Hagen,* 44 U.S. (3 How.) 212 (1845), *Weber* v. *Harbor Commissioners,* 85 U.S. (18 Wall.) 57 (1873), and the right to control when and how the beds were harvested, *Smith* v. *Maryland,* 59 U.S. (18 How.) 71 (1855), *McCready* v. *Virginia,* 94 U.S. (IV Otto) 391 (1876), were matters subject to the laws and jurisdiction of the state. The petitioners recognize these principles to be true (Petition 37, 39), but say, in effect, that since navigation is involved (vessels are used to harvest the oysters) and the oyster is sold in commerce, that state law does not apply. By this logic, it would be of little moment to say the states can control the use of its oyster beds. By this reasoning, anything which happens to an oyster boat or an oysterman would be cognizable in admiralty.[10]

This case deals with a tort committed by a municipality on dry land the results of which have limited the *use* by Petitioners of the oyster beds leased from the State. What rights, duties and obligations the City has in carrying out its sewage collection responsibilities is obviously a matter of state law. What rights the oysterbed leasee has in the leasehold he obtains from the state and what restrictions are placed on the use of that leasehold are likewise matters peculiarly subject to the application of state law. The harvesting of oysters is not the type of maritime activity that this Court felt would give rise to maritime jurisdiction:

[9] Petitioners' petition is replete with inaccuracies, which result from their attempt to make square facts fit into a round hole. For example, they talk of a ban on the harvesting of oysters (Petition 11, 14, and 16) when at best we are talking of a limitation on the direct marketing of oysters. Any suggestion that the City's act has interfered with the seeding and fattening of oysters or otherwise destroyed the oyster (Petition 19, 56) is a gross misstatement. Petitioners' know full well that their oysters grow better and bigger in contaminated waters. (See Answers to Interrogatories in Record). Even the suggestion that the oystering is done in documented vessels manned with crews (Petition 19) will find no support in the Record. In fact pre-trial discovery will show some of the Petitioners do not even own a boat. The assertion that the oysters harvested by Petitioners are placed "directly in interstate commerce" (Petition 52-53) will find no support in the Record. Perhaps the worst misstatement of all is the Petitioners' suggestion that the City released its sewage into streams feeding the Warwick River (Petition 22-23). The factual testimony of backed-up sewage coming out of a manhole in the middle of a city street gives the lie to this statement.

[10] If the City was negligent in destroying solid waste and a fire spread to oyster boats temporarily on shore for repairs, does admiralty jurisdiction attach because the use of the vessel in commerce is limited? If an oysterman is injured while swimming in navigable waters by a submerged rock, is his claim one in admiralty because he cannot fish? Obviously, the answer to these rhetorical questions is no. Yet, under the Petitioners' notion admiralty principles would obtain.

> (There must be a) relationship between the tort and traditional maritime activities, involving *navigation or commerce on navigable waters.* (*Executive Jet* at 256, Emphasis supplied).

That is all this case is about[11] and all that the Fourth Circuit has held. That result is mandated by *Executive Jet Aviation* v. *Cleveland,* 409 U.S. 249 (1972).

> The law of admiralty has evolved over many centuries, designed and molded to handle problems of vessels relegated to ply the waterways of the world, beyond whose shores they cannot go. That law deals with navigational rules—rules that govern the manner and direction those vessels may rightly move upon the waters. When a collision occurs or a ship founders at sea, the law of admiralty looks to those rules to determine fault, liability and all other questions that may arise from such a catastrophe. Through long experience, the law of the sea knows how to determine whether a particular ship is seaworthy, and it knows the nature of maintenance and cure. It is concerned with maritime liens, the general average, captures and prizes, limitation of liability, cargo damage, and claims for salvage.
>
> Rules and concepts such as these are wholly alien to air commerce, whose vehicles operate in a totally different element, unhindered by geographical boundaries and exempt from the navigational rules of the maritime

[11] This is not to say that the activities involved in the cultivation or harvesting of oysters cannot properly be the subject of admiralty. In many instances—for example, a collision involving an oyster boat, or injury to a crewman on board a vessel, admiralty law will apply. To that extent, oystering is as "traditionally maritime" as any other commercial activity involving the use and operation of vessels on navigable waters. *Union Oil Co.* v. *Oppen,* 501 F.2d 558 (9th Cir. 1974), on which the Petitioners rely so heavily, discusses the traditionally maritime nature of the fishing industry in this context. *Id.* at 560. But the injury complained of here—damage to shellfish beds from sewage discharges—is of a different nature, and is not related to the maritime aspects of the oyster industry.

> road. The matters with which admiralty is basically concerned have no conceivable bearing on the operation of aircraft, whether over land or water. (Id. 269-70.)

It is likewise clear that the "rules and concepts" of admiralty will not help in solving rights, duties and obligations of the parties when a sewage overflow causes a limitation on the use of oysterbeds. Hence, it is clear that this case does not present facts to meet the *Executive Jet* burden "that the wrong bear a significant relationship to traditional maritime activity." *Id.* at 268.

Not only is it clear that there is not a traditional maritime activity, but also that there is no maritime situs. The panel held[12] that "the Warwick River in the area of the beds involved in this case is a navigable stream, subject to the ebb and flow of the tide," and accordingly the situs test was met. That formulation does not properly consider where the tort occurred. At the site of the defendants' wrong, the stream and creek are not navigable. In point of fact, the entire episode starts in the middle of a public street. It might be a different matter if the City was directly discharging its effluent into the water. That is not the case. Whether the sewage flows into a nearby field, stays in the street, or makes its way to the creek is entirely fortuitous[13] and depends on the size of the overflow, the weather conditions, etc. It is perfectly clear that this tort occurs in non-navigable water and on land and takes effect when the station overflows. The damage to the plaintiffs might take effect days, months, or even years later.

To find maritime situs in this case has the Court applying the principles of admiralty to an occurrence in the middle

[12] The full Circuit did not speak to this point.

[13] This Court in *Executive Jet* noted that the fortuitiveness of the incident mitigated against finding jurisdiction. *Id.* at 270. The same is true in the instant case.

of a City street, five miles away from the oyster beds. If the Alaskan pipeline ruptures, with resultant oil spills in the Pacific Ocean, which ultimately make it impossible to direct market oysters in Virginia, is this Court to hold the maritime situs is where the plaintiff was damaged?

It extends admiralty jurisdiction too far[14] to hold that if the results of a tort committed on dry land ultimately impact on a navigable stream that the principles of admiralty jurisdiction should be invoked to settle the controversy. Yet this would be the result if the plaintiffs' view is adopted. It is also clear that in deciding whether the City was negligent, the trier of fact would not apply a single admiralty principle. That this is true can be seen when it is noted that the same inquiry would be required if the overflow ruined a field of wheat or a crop of oysters. Admiralty principles would not assist in answering either problem.

In closing its opinion in *Executive Jet, supra,* this Court noted that, in the previous term, it had recommended that the federal courts exercise caution in determining whether to expand admiralty jurisdiction. Citing *Victory Carriers, Inc.* v. *Law,* 404 U.S. 202 (1971), in which it had quoted the following language from *Healy* v. *Ratta,* 292 U.S. 263 (1934), the court reiterated that

> " 'The power reserved to the states, under the Constitution, to provide for the determination of controversies in their courts may be restricted only by the action of Congress in conformity to the judiciary sections of the Constitution. . . . Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which (a federal) statute has defined.' " 409 U.S. 249, at 272.

[14] Such an extension of federal jurisdiction would be in direct conflict with recent pronouncements to the contrary. See *Askew* v. *American Waterways Operators,* 411 U.S. 325, 332-34 (1973); *Oregon* v. *Corvallis Sand and Gravel Co.,*—U.S.—, 50 L. Ed. 2d 550 (1977); *Complete Auto Transit* v. *Brady,*—U.S.—, 51 L. Ed. 2d 326 (1977); *Puyallup Tribe* v. *Washington Game Dept.,* —U.S.—, 53 L. Ed. 2d 667 (1977) *Douglas* v. *Seacoast Products,* —U.S.—, 52 L. Ed. 2d 304 (1977) is not contrary to this trend as Petitioners might argue. That case dealt with the Supremacy clause and the unequal treatment of Virginia residents and non-residents. No such issues are raised in this case.

Applying that principle to the facts before it in *Executive Jet,* the Court ruled that "the Ohio courts could plainly exercise jurisdiction over the suit, and could plainly apply familiar concepts of Ohio tort law without any effect on maritime endeavors." 409 U.S. 249, at 273.

Similarly, the City asserts that the issues present in the case at bar are properly resolvable under Virginia law. They do not require application of the traditional concepts of maritime law for their resolution, nor would the purpose of uniformity in the law governing maritime commerce be affected by requiring this case to be decided in a State court. The Fourth Circuit correctly perceived this result and the result is in complete accord with the principles of *Executive Jet.*

Even if there is admiralty jurisdiction, the result below is proper. This Court has held that the universal rule of state immunity from suit without its consent extends not only to actions at law and suits in equity, but to cases of maritime and admiralty jurisdiction as well. *Ex Parte State of New York,* 256 U.S. 490, 497 (1921).

> That a state may not be sued without its consent is a fundamental rule of jurisprudence, having so important a bearing upon the construction of the Constitution of the United States that it has become established by repeated decisions of this court that the entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a state, without consent given; not one brought

by citizens of another state, or by citizens or subjects of a foreign state, because of the 11th Amendment; and not even one brought by its own citizens, because of the fundamental rules of which the Amendment is but an exemplification. (citations omitted)

* * *

Nor is the admiralty and maritime jurisdiction exempt from the operation of the rule.

And the point was emphasized at page 500.

We repeat, the immunity of a state from suit in personam in the admiralty, brought by a private person without its consent, is clear.

ARGUMENT II

No Writ Should Be Granted Because The Unanimous Federal And Virginia Authority Is That Governmental Activities Negligently Carried On In The Performance Of A Public Function, Unrelated To A Deliberate Taking Or Necessary Damage To Private Property, Are Mere Tortious Acts If Not A Necessary Consequence Or Result Of The Public Undertaking And Are Not Compensable Under The Fifth Amendment Of The Constitution.

The unanimous federal view and Virginia authority is that where governmental activities are negligently engaged in or carried on in the performance of some public function or duty unrelated to a deliberate taking or necessary damage to private property, and constitute mere tortious acts, not the necessary consequence or result of some public undertaking or project, there is no compensable taking within the meaning of the Fifth Amendment. 2 *A.L.R.2d* 677, "Damage to Private Property Caused by the Negligence of Governmental Agents as 'taking,' 'damage,' or 'use' for Public Purposes in a Constitutional Sense." See, for example, *V. T. C. Lines* v. *Harlan,* 313 S.W.2d 573 (Ky. 1957); *St.*

Francis Drainage Dist. v. *Austin,* 296 S.W.2d 668 (Ark. 1956); *Columbia Basin Orchard* v. *United States,* 132 F. Supp. 707 (Ct. Cl. 1955); *Sanquinetti* v. *United States,* 264 U.S. 146 (1924); *Eriksen* v. *Anderson,* 195 Va. 655, 79 S.E.2d 597 (1954).

Based on the facts of this case and the above proposition, the Petitioners' position that the negligence constituted a taking for which they must be compensated has no merit. No Court which has reviewed this issue has found any merit to this proposition of the Petitioners. See the District Court opinion (App. pp. 14-15) and the Fourth Circuit panel's decision. The full Circuit did not even think it appropriate to review the issue.

ARGUMENT III

A Writ Should Not Be Granted Because (1) There Are No Special And Important Reasons For Granting A Writ; (2) The Holding Of The Fourth Circuit Is A Limited One; And (3) The Petitioners Have Failed To Present The Case With Accuracy, Brevity And Clearness As Required By This Court's Rule 23(4).

In addition to the fact that this case is correctly decided in accordance with the applicable law and decisions of this Court, there are additional reasons for not granting a writ in this particular case. Under Rule 19 this Court notes that there should be "special and important" reasons for granting a writ of certiorari. Among those reasons are listed a conflict between Circuits, an important state question being decided contrary to state law, an important question being decided which has not been settled by this Court, and an important federal question being decided in conflict with this Court's opinion. On each of these grounds the Petitioners fall short.

The Petitioners make no claim that the instant case is decided in conflict with any other Circuit's opinion. Simi-

larly, it is clear that this case has been decided in accordance with Virginia law. Furthermore, this is not a case where the question involved is one that has not been settled by this Court. This Court settled the questions involved in this case in *Executive Jet Aviation, op cit.*

The Petitioners would like to frame this case as being in conflict with this Court's opinion in *Executive Jet;* however, as we have previously demonstrated, this case is in complete accord with that decision. The *Puyallup Tribe, op cit.* case decided by this Court last term should put to rest the issues being raised by the Petitioners.

Furthermore, the holding of the Fourth Circuit in this case is a narrow one which that Court limited to its fact (App. 64-65). Such a decision, limited to its facts, and frankly, involving unique and peculiar facts, does not serve as a proper vehicle to expound policy and principles as is the role of the decisions of this Court.

One other ground remains which it seems to the City argues against granting a writ in this case. Under Rule 23(4) this Court notes that the failure to present a case with "accuracy, brevity and clearness" will be grounds in and of itself for the dismissal of the Petition. We believe that the Petition offered in this case would come within Rule 23(4). The mischaracterization and inaccuracy of the facts set forth by the Petitioners are disturbing. Cases in which the parties cannot agree on the facts do not make good ones to grant a review for apparent reasons. The Petitioners note in their Petition on Page 15 of its Petition that "confusion (has) accompanied this case on its journey through the courts. . . ." The City would agree with this assertion and believes that the imprecise nature of the findings and facts and the presentation of these facts and principals involved have led to this confusion. For this reason, too, it would seem appropriate not to grant a writ.

CONCLUSION

For the reasons stated herein the writ of certiorari should not be granted.

Respectfully submitted,

JONES, BLECHMAN, WOLTZ & KELLY, P.C.
F. O. Blechman
Herbert V. Kelly
E. D. David
2600 Washington Avenue—Suite 700
Newport News, Virginia 23607
Counsel for Respondent